STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 94-CRS-40465

STATE OF NORTH CAROLINA)
)
V.)
)
RUSSELL WILLIAM TUCKER)

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SECOND AMENDMENT TO
MOTION FOR APPROPRIATE RELIEF
BASED ON NEWLY DISCOVERED EVIDENCE
AND
SECOND AMENDMENT TO MOTION FOR APPROPRIATE RELIEF
PURSUANT TO THE RACIAL JUSTICE ACT

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On October 30, 2017, Defendant Russell William Tucker, through counsel, filed his Motion for Appropriate Relief Based on Newly Discovered Evidence and Second Amendment to Motion for Appropriate Relief Pursuant to the Racial Justice Act, in which he has shown that the prosecutor at his capital trial struck five of five African American venire members and justified those strikes using a training document called "*Batson* Justifications: Articulating Juror Negatives" which provided pre-packaged excuses for removing black jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The State filed a timely Answer on May 25, 2018, and Tucker replied on July 25, 2018. On June 4, 2019, Tucker filed an Amendment to his pleading.

Pursuant to N.C. Gen. Stat. §15A-1415(g), Tucker hereby, for the second time, amends his Motion for Appropriate Relief Based on Newly Discovered Evidence and Second Amendment to Motion for Appropriate Relief Pursuant to the Racial Justice Act to include these additional facts and arguments. This amendment is intended to supplement, and not replace, any argument previously made.

A PATTERN OF DISCRIMINATORY JURY SELECION PRACTICES ACROSS MULTIPLE CASES SUPPORTS THE CONCLUSION THAT PROSECUTORS ACTED WITH PURPOSEFUL DISCRIMINATION IN SELECTING TUCKER'S JURY

A. The pattern of discrimination in Forsyth County

1. The Forsyth District Attorney's Office has a long and ongoing history of race discrimination in jury selection. The MSU study found that from 1990 to 2010, prosecutors in Forsyth County struck eligible African American venire members from capital cases at a rate 2.25 times higher than their strikes against other eligible venire members. Ex. 1, Grosso O'Brien Affidavit. Four of the twelve persons on death row from Forsyth County were, like Tucker, sentenced to death by all-white juries, and Forsyth has more black defendants sentenced to death by all-white juries than any other prosecutorial district in the state. The disparities are not confined to capital cases. An even more recent study from Wake Forest University found that in 2011, Forsyth prosecutors struck African American venire members from all types of jury trials at three times the rate they struck white venire members.

TABLE 6: REMOVAL RATIOS IN URBAN COUNTIES

CITY (COUN	Judges Blac	Judge Othe	Prosecutors Black-	Prosecutors Other-	Defense Black	Defense Other
Winston-Salem	1.6	2.7	3.0	4.0	0.6	0.8
Durham	1.1	1.0	2.6	1.5	0.5	0.3
Charlotte	1.0	1.9	2.5	2.3	0.3	0.5
Raleigh	1.2	1.4	1.7	1.9	0.4	1.0
Greensboro	0.9	0.4	1.7	1.6	0.4	1.0
Fayetteville	0.9	1.2	1.7	1.2	0.5	0.4

Wright, Ronald F. and Chavis, Kami and Parks, Gregory Scott, Ex. 69, p. 29, The Jury Sunshine Project: Jury Selection Data as a Political Issue (June 28, 2017); University of Illinois Law Review, Vol. 2018, No. 4, 2018.[1] This was the largest

[1] This study was previously unavailable to Tucker for procedural bar purposes.

disparity in the state, and almost twice that found in Wake, Guilford, or Cumberland Counties.

2. Furthermore, there is individualized evidence that both of Tucker's trial prosecutors tended to exercise strikes in racially discriminatory ways.

Rob Lang

3. Assistant District Attorney Robert Lang conducted jury selection for the State at Tucker's trial in 1996. Two years earlier, he conducted jury selection in the capital trial of Robbie Lyons. Lang's treatment of jurors in that case supports the conclusion that he exercised strikes on the basis of race in both Lyons and Tucker.

4. Consistent with the overwhelming trend in Forsyth County, African American prospective jurors were excluded from Lyons' trial at a vastly disproportionate rate. Lang questioned 38 qualified white jurors. He struck only 8, or 21%. By contrast, he struck five out of eight, or 62% of, African American or Hispanic jurors.[2] He thus struck jurors of color at almost three times the rate of white jurors.

5. Lyons' attorneys objected under *Batson* to these repeated strikes of non-white jurors, and Lang offered explanations for the State's strikes. Significantly, many of his responses mirror the suggestions offered by the *Batson* Justifications handout. For instance, he stated that Zandra Segers "**leaned** her **body language**" and "that she was **leaning away** from the entire jury selection process." Ex. 73, Excerpts of Lyons Jury Selection Transcript Tp. 109[3]. This language comes directly from Justification #5:

5. Body Language - arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.

Ex. 55, Excerpt from prosecutor's file, p. 10.

6. Of African American juror Patsy Hairston, Lang stated:

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[2] Lang had the opportunity to strike seven African American venire members and one Hispanic venire member. He struck the one Hispanic venire member and four African American venire members. These calculations were made using the peremptory strike and race information contained in the Lyons Jury Selection Transcript, Exhibit 73a; the Lyons Juror Questionnaires, Exhibit 74, and the Lyons Superior Court Clerk's jury chart, Exhibit 75.

[3] Defendant is attaching relevant excerpts of *State v. Lyons* Jury Selection as Exhibit 73. The complete Jury Selection transcript is provided on disc as Exhibit 73a.

> We also note that she **didn't understand** on literally every question that we asked that all other eleven jurors answered almost immediately she was **evasive** in her answers. She had **difficulty following the questions** and that she repeatedly asked me to repeat the questions... That when we tried to explain things to her, she looked puzzled and she **couldn't apparently understand** when I talked about some of the issues that some of the other jurors were able to grasp.

Ex. 73, Lyons Jury Selection Transcript, Tp. 108. This language was clearly borrowed from Justifications #7 and #8:

7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.

8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.

Ex. 55, Excerpt from prosecutor's file, p. 10. As in Tucker, the fact that these explanations were suggested by the handout strongly supports the conclusion that Lang used them pretextually to conceal a discriminatory motive.[4]

7. Moreover, as scholar Ibram X. Kendi has noted, the particular justifications Lang chose to employ are "not race neutral at all" but "based on longstanding racist stereotypes." Ex. 72, Kendi Affidavit, ¶ 6. Lang's claim that Hairston couldn't "grasp" the concepts presented in jury selection echoes "the most common racist idea" of all, that African Americans possess "inferior intelligence [and] cognitive ability." *Id.* at ¶11. Similarly, when Lang cited Segers' "body language" and her "leaning away," he was referencing "the construct of African Americans as defiant and difficult to deal with," an idea "as old as slavery." *Id.* at ¶13. Kendi explains that, "the body language, behavior, and 'attitude' of African Americans is still routinely

[4] In the course of RJA litigation, the State disclosed that the *Batson* Justifications handout was distributed at a training called Top Gun II, which took place in the summer of 1995, but the State never disclosed any other information about the origins of the document. Lyons' trial took place in the spring of 1994. Lang's apparent use of the handout at Lyons' trial indicates that it was in circulation among North Carolina prosecutors prior to 1995. Another possibility is that the handout was first developed and used by the Forsyth County District Attorneys' office and later distributed statewide at Top Gun II.

stereotyped and scrutinized." *Id.* at ¶14. Indeed, Lang acknowledged on the record his scrutiny of Segers: "her body language" was "discussed by us at the break we took between Detective Baron and Mr. Spivey, Mr. Green who is the victim/witness coordinator who is helping us in jury selection and *we all discussed her body language* was the worst of any of the jurors." Ex. 73, Lyons Jury Selection Transcript, Tp. 109 (emphasis added).

8. Another reason Lang gave, although not on the *Batson* Justifications handout, has similar racial implications when considered in the context of history. Lang stated that Hispanic juror Sandra Clavijo "didn't have a sufficient stake in the community." Ex. 73, Lyons Jury Selection Transcript, Tp. 107. "This echoes the way [people of color] have historically been viewed as 'other,' and not true citizens" due to assumptions that "United States citizenship should be reserved for Whites." Ex. 72, Kendi Affidavit, ¶ 20.

9. Lang's actions, as well as his words, further belie the State's true motives. While supposedly basing his strikes on various characteristics of the jurors of color, Lang accepted white venire members with the same traits. He said that he struck African American juror Hairston because she was a nurse and "in our analysis we did not want those folks with an absolute nurturing type of personality. Ex. 73, Lyons Jury Selection Transcript, Tp. 108. Yet the State accepted at least three white nurses and one white doctor. Lang even passed white nursing student Linda Lemmons after she told him, "my entire career has been focused on life and it being precious and preserving life... I would have to say [the death penalty] is kind of in conflict with some of the basic nursing principles." Ex. 73, Lyons Jury Selection Transcript, Tpp. 657, 662. [5]

10. Similarly, Lang claimed he struck African American juror Janice Glenn because she "appeared to have a serious problem with plea agreements and plea bargains." But the State passed numerous white venire members who expressed distaste for the State's plan to rely on accomplice testimony obtained through a plea agreement. Ex. 73, Lyons Jury Selection Transcript, Tpp. 149 (Wiebers); 323, 338 (Drye); 507 (Garrison); 610 (Grubbs); 620 (McCune); 662 (Lemmons); and 689 (Bradley).

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[5] In addition to Lemmons, the State accepted white nurse Eddie Grubbs. Ex. 73, Lyons Jury Selection Transcript, Tp. 611. The State also accepted Patsy Sweat, who was white and worked as a restorative aide with Winston-Salem Convalescent Center. Ex. 74 Lyons Juror Questionnaires. Denise Young, a white physician, was also initially accepted by the State, although later excused for cause due to her pregnancy. Ex. 74, Lyons Juror Questionnaires.

11. The supposed bases for Lang's claim that he struck Sandra Clavijo because she lacked "stake in the community" also conflict with the record. He told the court he struck Clavijo because she was single, Ex. 73, Lyons Jury Selection Transcript, Tp. 107, while accepting no fewer than seven single, separated, or divorced white venire members.[6] He claimed he struck Clavijo because she had only been at her current job for four months, while passing white jurors who had been employed for one week, one month, two months, and nine months. Ex. 74, Lyons Juror Questionnaires. He also claimed Clavijo was unacceptable because she "had not voted in an election since 1989," five years earlier. Ex. 73, Lyons Jury Selection Transcript, Tp.107. But he passed four similarly situated white jurors: Bobbie Bradley had not voted in "several years"; Rocky Thompson had not been to the polls since 1983; Patsy Sweat had "never" voted. Ex. 74, Lyons Juror Questionnaires. And the State accepted William Hunter although he left the question of when he last voted blank on his questionnaire. *Id.* Tellingly, Lang never asked him about it. *See Miller-El II*, 545 U.S. at 246 ("'The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" (citations omitted)).

12. As to Zandra Segers, Lang claimed that he struck her because, in addition to having "the worst" body language, "she stated that the death penalty was simply an option and that she felt that she was not absolutely unequivocal on her ability to impose the death penalty." Ex. 73, Lyons Jury Selection Transcript, Tp. 109. This is a glaring mischaracterization of Segers' answers. Asked how she felt about the death penalty, Segers stated "It's a necessary option." Ex. 73, Lyons Jury Selection Transcript, Tp. 76. In using the word "option," Segers was simply echoing Lang's own script. Immediately before he questioned Segers, Lang asked one juror on her panel "...you feel that the death penalty is an **option** in the sentencing phase...?", and asked another, "I take it by that answer that you would consider the death penalty as one of the **options**...?" Ex. 73, Lyons Jury Selection Transcript, Tpp. 70, 74 (emphasis added). He used the word when questioning Segers herself. *Id.* at 77 ("Do you feel the death penalty is an option you could consider...?"). And he continued to use it throughout voir dire. *Id.* at 80 ("Do you feel that the death penalty would be an option in your deliberations...?"); 202 ("You feel you can consider the death penalty as an option?"); 314 ("As one of the options?"); 400 ("So you would consider the death penalty as one of the options at the sentencing phase?). In turn, several jurors in addition to Segers, used the word "option" in describing their support for the death penalty, including white jurors the State accepted. Ex. 73, Lyons Jury Selection Transcript, Tpp. 147 (Lang: "Would you be able to consider the death penalty as an option at sentencing?" Wiebers: "As an option."), and 400 (Marshall: "...you would have to take that as an option that you had to face.").

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[6] Patsy Sweat (divorced); Bobbie Bradley (divorced); Scotty Myers (single); Robin Idol (separated); Joan Atwater (single), Curtis Jones (divorced); Norm Weiland (single) Ex. 74, Lyons Juror Questionnaires.

13. In truth, Segers was among the strongest voices in support of the death penalty. She expressed nothing even resembling doubt about her ability to impose it. In fact, she said that she "definitely" could and "would" be able to vote for death. Indeed, she considered it her "duty."

MR. LANG: Thank you, Ms. Adkins. Ms. Segers, again I'll ask you and you've had some time to think about it now, how do you feel about the death penalty?

MS. SEGERS: It's a necessary option.

MR. LANG: Do you agree that it's a necessary part of the law in some circumstances?

MS. SEGERS: Yes.

MR. LANG: You understand the two phase guilt/innocence and sentencing phase?

MS. SEGERS: Yes.

MR. LANG: I would ask you, Ms. Segers, if we prove to you beyond a reasonable doubt -- the State of North Carolina proves that the defendant is guilty of first degree murder, could you find him guilty?

MS. SEGERS: Yes.

MR. LANG: Having found the defendant guilty of first degree murder, we would move onto the sentencing phase. Do you feel that if you're satisfied beyond a reasonable doubt that the aggravating circumstances

outweigh the mitigating circumstances and that the death penalty was an appropriate punishment, would you be able to vote to impose the death penalty on the defendant?

MR. GSTEIGER: Objection.

THE COURT: Overruled.

MS. SEGERS: Yes, I would. I would be able to.

MR. LANG: Do you feel that the death penalty is an option you could consider if you were a juror selected to sit on this case?

MS. SEGERS: Yes.

MR. LANG: Do you feel that some cases call for the death penalty?

MS. SEGERS: Definitely, yes.

MR. LANG: How would you feel if you were part of a jury that came back and recommended to the Court a sentence of death?

MS. SEGERS: I would feel as if it was my duty according to the law.

MR. LANG: So you're telling me that you would be able to listen to the law that the judge gives you and apply it to the facts that you hear at the sentencing hearing and weigh those in your mind using your common sense and reason?

MS. SEGERS: Yes.

MR. LANG: Do you think it would provide any

problem to you to be part of that jury that came back if you felt it was appropriate?

MS. SEGERS: No.

MR. LANG: Again going through the litony again, if you came to that conclusion and felt that the death penalty was appropriate punishment after weighing the aggravating and mitigating if they were proved to you beyond a reasonable doubt and you felt that the death penalty was the appropriate punishment, do you have the courage to stand by your feelings?

MS. SEGERS: Yes.

MR. OSTRIGER: Objection.

THE COURT: Overruled.

MS. SEGERS: Yes, I do.

MR. LANG: If you were selected as the foreman, do you feel you could sign your name to the verdict sheet that imposed the sentence of death?

MS. SEGERS: Yes, I could.

MR. LANG: Do you think you could make a check mark or write the word "death" outside on the verdict sheet?

MS. SEGERS: Yes, I could.

Ex. 73, Lyons Jury Selection Transcript, Tpp. 76-78. Lang's suggestion that Seagers' support for the death penalty was weak was nothing more than a pretextual mischaracterization of the record. "When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent." *Flowers v. Mississippi*, 139 S.Ct. at 2250.

14. Similarly, in justifying his strike of Hairston, Lang claimed she was not sufficiently supportive of the death penalty, Ex. 73, Lyons Jury Selection Transcript, Tp. 108, but her voir dire answers contradict this. She said "some cases call for the death penalty and I don't understand why it's not carried out... I believe that it's the law of the land and we should keep to the law of the land so if we do things that go against the law of the land then we have to get whatever punishment is necessary." Ex. 73, Lyons Jury Selection Transcript, Tp. 84. Twice she answered yes to whether she could sign her name to a death verdict. *Id.* at 85.

15. In contrast to his treatment of Segers and Hairston, Lang accepted a slew of white venire members who expressed unmistakable ambivalence about the death penalty. Ex. 73, Lyons Jury Selection Transcript, Tpp. 396 (Marshall: "I'm a little bit mixed."); 514 (Garrison: "I have mixed emotions about it. With my position in the church I find it difficult to conceive of taking a life..."); 515 (Lowry: "I have mixed emotions also..."); 522 (Weiland: "Personally, I wouldn't feel, you know, too super about it..."); 556 (Hall: "I feel that in some cases it's justified. Not in every case but in some."); 609 (Grubbs: "I think it would be a tragic affair but I think it's necessary sometimes."); 619 (McCune: "I wouldn't like it but I think I could be objective."); and 657 (Lemmons: "It would weigh heavy...").

16. In short, Lang's claim that he struck Segers and Hairston on the basis of their death penalty views finds no support in the record. The State's acceptance of so many white venire members with reservations about the death penalty also casts doubt on Lang's claim that he struck African American jurors Janice Glenn and Virginia Martin based on their death penalty views. Ex. 73, Lyons Jury Selection Transcript, Tp. 416.

17. Lang also claimed that he struck Hairston because she "had difficulty following questions" and couldn't "grasp" certain concepts. A review of the record undermines this assertion. Hairston asked some clarifying questions, but they evinced her engagement in the process rather than an inability to understand. Ex. 73, Lyons Jury Selection Transcript, Tpp. 53, 82, 83, 96. In fact, Lang himself seemed to know his questions were potentially confusing:

> MR. LANG: Thank you, Mr. Goodwill. I'm going to ask just a general question to you all. It's very very important for everybody to go through these questions. Does the fact that the death penalty is involved in this case as a possible option if we get to sentencing, would that make it difficult for someone to sit on the jury in guilt/innocence? What I'm getting at is if you have some kind of personal belief or something that would make it difficult for you to impose the death penalty, would it make it difficult for you to sit on the guilt/innocence phase because you're looking forward with some concern about what may happen if you find him guilty of first degree murder? Do you understand what I'm trying to get at? Does everybody understand what I'm trying to say? Does anybody think that the -- yes, ma'am.
>
> MS. HAIRSTON: What did you say?

Ex. 73, Lyons Jury Selection Transcript, Tp. 96. Lang responded with some clarification, and Hairston immediately indicated that she understood:

> MS. HAIRSTON: Are you trying to say would I believe the death penalty would affect our determination of whether that person was guilty or not and cause us to change our verdict because --

Id. at 97. Lang interrupted her to agree with her articulation of the issue: "You probably asked it better than I asked it." *Id.*

18. Later on in voir dire, white venire member Donna Marshall expressed confusion about the same question:

> MR. LANG: That aside, guilt/innocence aside, do you have -- would you have a problem at the sentencing phase or actually at the guilt/innocence phase from the fact, like I asked Ms. Glenn, sitting with the death penalty over there waiting where you may have to make a tough decision, would it affect [illegible] be as fair in that guilt/innocence stage? What I'm asking is would you take the easy way out and maybe run away from having to face that death penalty issue? Do you get what I'm saying?
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> MS. MARSHALL: Not exactly.

Ex. 73, Lyons Jury Selection Transcript, Tp. 398. The State accepted Marshall as a juror. Lang's justification that Hairston as unable to "understand" and "grasp" the process was not only demeaning but inaccurate as well.

19. The totality of these circumstances strongly supports the conclusion that Lang exercised strikes on the basis of race at Lyons' trial.[7]

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[7] In 1996, the North Carolina Supreme Court rejected Lyons' *Batson* claim. *State v. Lyons*, 343 N.C. 1 (1996). Lyons was executed in 2003. However, at that time, the State was still concealing its reliance on the *Batson* Justifications handout, which shows that many of the reasons offered were actually pretextual.

In addition, the law has changed since the North Carolina Supreme Court considered Lyons' *Batson* claim in 1996. When considering Lang's purported

reasons for striking Hairston, for instance, the *Lyons* Court was unmoved by the fact that the State accepted three white nurses:

> Although it is proper for the trial court to consider whether similarly situated white veniremen are accepted as jurors, the defendant in this case takes a single factor among several articulated by the prosecutor and attempts to match it to a passed juror exhibiting the same factor. This approach "fails to address the factors as a totality which when considered together provide an image of a juror considered ... undesirable by the State." *State v. Porter,* 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990). When considered in this light, we believe that the State has met its burden of coming forward with neutral, nonracial explanations for each peremptory challenge.

Lyons, 343 N.C. at 13, 14. But this approach was overruled in *Miller-El* in 2005. In *Miller-El*, 545 U.S. at 241, the Supreme Court described comparisons of struck black jurors and accepted white jurors, who were similar to one another, as "more powerful" evidence of discrimination than statistical disparities:

> More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.

The Court made clear that such evidence, referred to as "comparative juror analysis," is probative of the ultimate issue of purposeful discrimination even if the compared jurors are not identical in every respect. The Court squarely rejected the dissent's contrary view that comparisons were not probative unless the jurors were identical. *Miller-El*, 545 U.S. at 247 n.6 ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one . . . . A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.").

North Carolina adopted *Miller-El*'s comparative juror analysis in 2010 in *State v. Waring*. 364 N.C. 443, 475-91 (2010) (considering single-trait comparisons

David Spence

20. David Spence also prosecuted Tucker. Although he did not conduct the questioning of potential jurors for the State, he sat with Lang at the counsel table and presumably took part in strike decisions.

21. The MSU study looked at four of Spence's cases from Forsyth County. When the strikes in those cases are considered together, Spence struck 62% of African Americans but only 20% of whites. That strike rate ratio of 3.1 is significantly higher than either the Forsyth County or state average for capital cases. In only one of Spence's four trials examined by MSU did the jury contain more than one African American member, and two, including Tucker's, had all-white juries. *See* Amended RJA MAR filed August 31, 2012.

22. In fact, the Court of Appeals found that Spence discriminated against African American venire members in a different capital case. Henry Jerome White was tried capitally in Forsyth County one year after Tucker was sentenced to death. Spence used four peremptory strikes against African American jurors, and the defense objected under *Batson*. Ex. 70, Excerpt of White Appellant's Brief and Attachments. In offering reasons for the strikes, Spence actually admitted in open court to striking two of the potential jurors because they were black, telling the trial judge:

> ***Both black females***, both 27 years old, old enough. Almost the same age as the defendant. Sonya was personally opposed to the death penalty. Carolyn [sic] Reynolds is living with her mother, doesn't have a stake in the community. She's single, has an illegitimate child, health care provider. State thinks that people who want to save lives don't want to take lives. And she didn't think having her purse stolen was a serious crime.... And

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as potentially probative). The Supreme Court, meanwhile has repeatedly reiterated this approach, most recently in *Flowers*: "[a]lthough a defendant ordinarily will try to identify a similar white prospective juror whom the State did not strike, a defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent." *Flowers*, 2019 WL 2552489, at *15 (emphasis in original; citing *Miller-El*, 545 U.S. at 247 n.6); *see also Snyder*, 552 U.S. at 483-85 (finding *Batson* violation based on single-trait comparison of black juror struck because of an out-of-court obligation, with white jurors who had similar hardships); *Foster*, 136 S. Ct. at 1750-51 (finding evidence of discrimination where the prosecutor struck black jurors because they were divorced or young, but accepted white jurors who were also divorced or young).

> judge, on Miss Jeter, her cousin was convicted by Detective Rowe. Again, she's another health care provider.

State v. White, 131 N.C. App. 743, 739-40 (1998) (emphasis added); see also Ex. 70, Excerpt of White Appellant's Brief and Attachments.

23. A unanimous Court of Appeals panel found:

> ***race was certainly a factor*** in the prosecutor's reasons for challenging Reynolds and Jeter... From the prosecutor's statements, it is apparent that ***race was a predominant factor*** in his decision to strike Jeter and Reynolds from the venire. It could be argued that the most telling evidence of the prosecutor's intent is the fact that the first words from his mouth as he addressed his reasons for striking Jeter and Reynolds was "[b]oth black females," not "both health care providers" or "both 27 years of age." The explanation, on its face, belies racial neutrality and manifests an intent to exclude these individual jurors based upon their membership in a distinct class.

White, 131 N.C. App. at 740 (emphasis added).[8] In other words the *White* Court found that the defendant's *Batson* claim met the standard that would later be articulated in *Miller-El*, *Snyder* and *Foster*— the same standard Tucker must meet here—that the prosecutor's strikes were "motivated in substantial part by discriminatory intent." See *Foster*, 136 S.Ct. at 1754 (citing *Snyder*, 552 U.S. at 485); *see also State*

[8]The *White* Court made its finding that race was the predominant factor without conducting any comparative juror analysis. But such an analysis would have supported the conclusion. See *State v. White*, 96 CRS 9440 (Forsyth County) Defendant's Motion for Appropriate Relief, February 11, 2020, pp. 11-15. Specifically, with respect to Caryl Reynolds, the prosecutor claimed he struck her, in part, because she was "living with her mother, doesn't have a stake in the community." Ex. 76, White Jury Selection Transcript, Tp. 236. (Defendant is attaching relevant excerpts of State v. White Jury Selection as Exhibit 76. Complete Jury Selection transcript provided on disc as Exhibit 76a.) But Reynolds told the prosecutor she had lived in Forsyth County her entire life. Ex. 76, White Jury Selection Transcript, Tp. 227. By contrast, the State accepted multiple white jurors who had only lived in Forsyth County for short periods of time. *See* Ex. 76, White Jury Selection Transcript, Tpp. 489 (Tommy Gunn, six years); 245 (Lonnie Watkins, two years); 392 (Theodore Morgan, three years); and 318 (Judith Williams, four-and-a-half years). Similarly, the State accepted two white jurors who, like Reynolds, did not own a home and lived with relatives. *See* Ex. 76, White Jury Selection Transcript, Tpp. 113 (Donna Rothrock, lived with grandfather); and 323 (Thomas Quick, lived with mother).

v. Waring, 364 N.C. 443, 480 (adopting the "significant factor" standard articulated in *Miller-El* and expressly rejecting requirement that race must be the sole reason for the strike). Thus while the *White* Court ultimately denied relief, it did so using now-outdated North Carolina case law which held *Batson* only prohibits prosecutors from striking jurors *solely* on the basis of race.

B. This Pattern Supports Tucker's *Batson* Claim

24. The repeated discriminatory behavior of Lang, Spence, and their colleagues in the Forsyth County DAs office constitutes a pattern that strongly supports the conclusion they used race as a factor when they selected Tucker's jury. *See Miller-El*, 545 U.S. at 264 (finding *Batson* violation in part due to history of discriminatory practices, including both formal and informal policies, in the district attorney's office).

25. There are remarkable similarities between the State's jury selection practices in *Tucker*, *Lyons*, and *White*, three capital trials held within a few years of each other. In every case, prosecutors struck African American prospective jurors at sharply disproportionate rates. In every case, when confronted with a *Batson* objection, the assistant district attorneys turned repeatedly to the same justifications. And in every case, those justifications fail to hold up to scrutiny.

a. Strike Disparities

26. At Tucker's trial, Lang and Spence struck 5 of 5 eligible black jurors, 100%. By contrast, they struck only 7 of 33 eligible white jurors, or 21%. Thus, in Tucker's case, the State removed black jurors at nearly five times the rate of white jurors.

27. In *Lyons*, Lang struck 5 of 8 jurors of color, or 62%. By contrast, he struck 8 of 38 eligible white jurors, or 21%. Thus, in Lyons' case, the State removed jurors of color at more than three time the rate of white jurors.[9]

28. In *White*, Spence struck 4 of 7 eligible black jurors, or 57%. By contrast, he struck only 8 of 34 eligible white jurors, or 24%. Thus, in White's case, the State removed black jurors at more than twice the rate of white jurors. See *State v. White*, 96 CRS 9440 (Forsyth County) Defendant's Motion for Appropriate Relief, February 11, 2020, p. 7.

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[9] These calculations were made using the peremptory strike and race information contained in the Lyons Jury Selection Transcript, Exhibit 73a; the Lyons Juror Questionnaires, Exhibit 74, and the Lyons Superior Court Clerk's jury chart, Exhibit 75.

29. These statistics supply substantial evidence of discrimination. *See Miller-El*, 545 U.S. at 240-41 (noting that "[t]he number describing the prosecution's use of peremptories" may provide evidence of a *Batson* violation).

b. The Batson *Justifications Handout*

30. When faced with *Batson* objections arising from their glaringly disproportionate strikes, Lang and Spence made liberal use of the *Batson* Justifications handout. They repeatedly cited jurors' "body language." (Tucker Tr. Vol I, p. 205; Lyons Tp. 109; White Tp. 124); lack of "eye contact" (Tucker Tr. Vol I, p. 205-06; White Tp. 124); and confusion or lack of understanding (Tucker Tr. Vol. II-A, p. 441; Lyons Tp. 108; White Tp. 425).

c. Supposed Strategy to Strike Health Care Providers

31. In each of these three cases, Lang and Spence justified their strikes of African American women by pointing out that they were health care providers; each time, the prosecutors used very similar language. Tucker Tr. Vol. I, p. 206 "It has been an experience that those who save lives are often hesitant to make a recommendation for death."); Lyons Tp. 108 ("in our analysis we did not want those folks with an absolute nurturing type of personality"); *White*, 131 N.C. App. at 739-40 ("State thinks that people who want to save lives don't want to take lives.").

32. "On [its] face, [the State's] justification[]...[might] seem reasonable enough." *Foster*, 136 S.Ct. at 1749. However, as in *Foster*, an "independent examination of the record... reveals that... the reasoning provided... has no grounding in fact." *Id.* A strategy to exclude health care providers could be believable, were it not for the fact that Lang and Spence repeatedly welcomed *white* health care providers onto their juries. In *Tucker*, they passed a white male pharmacist whose job was to save the lives of leukemia patients. See MAR p. 33; Tucker Tr. Vol I, p. 466-68. In *Lyons*, Lang passed four white healthcare workers. In the 1995 trial of *State v. Larry*, 94 CRS 1451 (Forsyth County), Spence accepted a young white woman who was working as a nursing assistant and studying nursing. Ex. 77, Larry Jury Selection Transcript, Tp. 283;[10] *State v. Larry*, 94 CRS 1451 (Forsyth County), Amendment Based on *Batson v. Kentucky* and New Evidence of Intentional Discrimination, July 22, 2019, p. 10.

33. The pattern extends to other Forsyth County prosecutors. At Cerron Hooks' 2000 trial, the State passed a nurse and two other white venire members who served as caregivers. Ex. 78, Hooks Jury Selection Transcript, Vol. II, Tpp. 381-82 (Rena Waring served as a reading and math tutor at a local elementary school and as a hospice volunteer visiting patients and taking meals); Vol. II, Tp. 304 (Elizabeth

[10] Defendant is attaching relevant excerpts of State v. Larry Jury Selection as Exhibit 77. Complete Jury Selection transcript provided on disc as Exhibit 77a.

Bowman worked with people with disabilities); and Vol. III, Tpp. 491-93 (Gloria Willis worked as a nurse with surgical patients).[11]

34. Given this pattern, the prosecutors' claim at Tucker's trial that "the State is not seeking nurses on death penalty jur[ies]," Tucker Tr. Vol I, Tp. 206, appears to be nothing more than another prefabricated excuse, its purpose being to conceal discrimination.

d. Lack of "Stake in the Community"

35. In *Tucker*, *Lyons*, and *White*, Lang and Spence asserted that they were striking African American citizens from the jury because those prospective jurors lacked a sufficient "stake in the community." As shown above, that excuse has its roots in our nation's long history of denying African Americans the full rights of United States citizenship. Ex. 72, Kendi Affidavit, ¶ 20.

36. It is not surprising then, that Lang and Spence seem to have applied the criteria differently when considering white prospective jurors. As Tucker has already shown, the State accepted numerous white jurors who were not registered to vote, had short employment histories, or were renters rather than home owners. And, as shown above, Lang did the same in *Lyons* and Spence did the same in *White*.

e. Use of Identical or Similar Language in Multiple Cases

37. It is also highly suspicious that Lang and Spence used nearly identical language across multiple cases to justify their strikes against African American jurors. In *Tucker*, *White*, and *Lyons*, they used the phrase "stake in the community." In *Tucker* and *White*, they said that "those who save lives are often hesitant to make a recommendation for death" and "people who want to save lives don't want to take lives."

38. Given Spence's and Lang's acceptance of similarly situated white jurors and their use of the *Batson Justifications* handout, this strong similarity of wording across cases suggests that these excuses were prefabricated.

f. Finding of Discrimination in White

39. Finally, the finding of race discrimination in *White* is strong evidence tending to show that race was also a significant factor in Spence and Lang's strike decisions at Tucker's trial just a year earlier. As shown above, Spence's proffered reasons for the strikes in *White* mirror those that Lang, with Spence sitting beside

[11] Defendant is attaching relevant excerpts of State v. Hooks Jury Selection as Exhibit 78. Complete Jury Selection transcript provided on disc as Exhibit 78a.

him, gave in *Tucker*. The only difference is that in *White*, Spence let slip his true reasons for the strikes: "both black females."

CONCLUSION

Tucker's jury selection "cannot be considered in isolation." *Flowers v. Mississippi*, 139 S.Ct. 2228 at 2250. In *Flowers*, the Supreme Court took into account, not only the strikes in the instant case, but also the fact that "the State's pattern of striking black prospective jurors persisted from Flowers' first trial through Flowers' sixth trial." *Flowers*, 139 S.Ct at 2251. Similarly, given the pattern of prosecutorial behavior, "the overall context here requires skepticism of the State's" strikes. 139 S.Ct. at 2250. This Court "cannot just look away." *Id.*

Respectfully submitted this the 13th day of February 2020.

Elizabeth Hambourger

Mark Pickett

CERTIFICATE OF SERVICE

I hereby certify that I sent a copy of the above and foregoing pleading by first class mail, postage pre-paid, to:

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I further certify that on this day I electronically sent the foregoing pleading to:

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This the 13th day of February 2020.

Counsel for Defendant